

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),)
FM Table of Allotments)
FM Broadcast Stations.)
(Ft Collins, Westcliffe and)
Wheat Ridge, Colorado))

MB Docket No. 03-57
RM-10565

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION FOR RECONSIDERATION

Jacor Broadcasting of Colorado, Inc. ("Jacor"), the licensee of Station KTCL(FM), Ft Collins, Colorado, by its attorneys, hereby submits this Opposition to the Petition for Reconsideration dated April 5, 2004 (the "Petition"), submitted in this docket by Meadowlark Group, Inc. ("MGI")

By *Report and Order*, DA 04-738 (released March 19, 2004) (the "Order"), the Assistant Chief, Audio Division, Media Bureau, adopted the proposal set forth in the Notice of Proposed Rulemaking (the "*NPRM*") ^{1/} to modify the Commission's Table of Allotments for FM Broadcast Stations (Section 73.202 of the Commission's Rules) to substitute Channel 227C0 for Channel 227C at Ft. Collins, Colorado, to reallocate Channel 227C0 from Ft. Collins to Wheat Ridge, Colorado, to modify the license of Station KTCL to specify Wheat Ridge as its community of license and to substitute Channel 249A for vacant Channel 227A at Westcliffe, Colorado (collectively, the "*NPRM* Proposal").

^{1/} See *Fort Collins, Westcliffe and Wheat Ridge, Colorado*, 18 FCC Rcd 4461 (Media Bureau 2003).

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Comments in this proceeding were filed by Jacor's predecessor, Tsunami Communications, Inc. Jacor filed Reply Comments, reiterating the intent of Station KTCL to file an application for operation on Channel 227C0 at Wheat Ridge if the *NPRM* Proposal were adopted. In addition, MGI filed in this proceeding Comments and Counterproposal dated May 2, 2003 (the "MGI Counterproposal") and Reply Comments. The MGI Counterproposal had sought, *inter alia*, the allotment of Channel 248C to Creede, Colorado, which was inconsistent with the *NPRM* Proposal to modify the Westcliffe, Colorado allotment to Channel 249A. Moreover, the MGI Counterproposal was contingent on the reclassification of Station KRFX(FM), Channel 278C, Denver, Colorado (also licensed to Jacor), from a Class C to a Class C0 station, in the pending, separate proceeding, *Order to Show Cause, Reclassification of License of Station KRFX(FM), Denver, Colorado*, DA 03-585 (Ass't Chief, Audio Div, rel. March 4, 2003) ("*Order to Show Cause*"). 2/

The *Order* dismissed the MGI Counterproposal, noting that "Jacor ... has responded to the *Order to Show Cause* by filing an application for Channel 278 as a full Class C facility. Until the application for Channel 278C at Denver is dismissed, the counterproposal filed by MGI is technically defective." 3/

2/ The *Order to Show Cause* was issued in response to an original petition for rule making filed by Akron Broadcasting Company seeking to amend the FM Table of Allotments by allotting Channel 279C1 at Akron, Colorado, and, to accommodate such allotment, requesting the reclassification of Station KRFX to Class C0. Jacor, as the licensee of KRFX, filed a response to the *KRFX Order* stating that KRFX would file an application to maintain full Class C status, and, in fact, such a minor modification application was filed by Jacor with the Commission on April 24, 2003. See FCC File No. BPH-20030424AAO (the "KRFX Application").

3/ See Order at ¶ 6 (citing *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 15 FCC Rcd 21,649 (2000)).

In its Petition, MGI argues that the Division committed “cardinal procedural error” in dismissing the MGI Counterproposal. 4/ Citing to inapposite case law, MGI suggests that the Division somehow inappropriately “bifurcated” this rule making proceeding from the distinct KRFX *Order to Show Cause* proceeding. Thus, argues MGI, the Division should have considered in this docket the “merits or lack of merits of the KRFX Application,” together with the *NPRM* Proposal and the MGI Counterproposal. 5/

MGI has it backwards. It would have been “cardinal procedural error,” *if* the Division had *failed* to dismiss the MGI Counterproposal, which was technically defective at the time of its filing. That is because it is “cardinal” FCC procedure that counterproposals in allotment proceedings must be technically correct and substantially complete at the time of filing. 6/ Specifically, it is “cardinal” Commission policy “not to accept rulemaking proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit or are dependent upon final action in another rulemaking proceeding.” 7/ Even more specifically, the Commission expressly stated that “reclassification [from Class C to Class C0

4/ See Petition at ¶ 2.

5/ See *id.* at ¶ 8

6/ See e.g., *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13,181 at ¶ 4 (Allocations Br 1997) (counterproposal is not “technically correct and substantially complete” at the time of filing when short-spaced to licensed site; “[p]roposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions.”).

7/ *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 18 FCC Rcd 22 at ¶13 (Ass’t Chief, Audio Div., rel Jan 8, 2003) (footnotes omitted).

in an allotment proceeding] may be initiated only through an *original* petition for rule making to amend the FM Table of Allotments, and not through comments or counterproposals.” 8/

Thus, notwithstanding that the MGI Counterproposal could not be effectuated at the time of its filing because it was dependent upon action in another proceeding (the KRFX reclassification proceeding), and notwithstanding that the Commission has expressly prohibited the initiation of reclassifications by counterproposals, MGI believes that its Counterproposal should have been considered rather than dismissed as technically defective. Clearly, if the Commission were to ignore its carefully-crafted procedural requirements for counterproposals, as urged by MGI, the Commission would wreck havoc on its orderly process of accommodating changes to its Table of Allotments, while carrying on the day-to-day business of granting applications for new and modified station facilities

Because the MGI Counterproposal was technically defective at the time of filing, there was no cognizable counterproposal for the Commission to compare against the *NPRM* Proposal, nor has there been a need to consider in this docket MGI’s negative aspersions on the grantability of the KRFX Application. Furthermore, since it is dispositive that, *at the time of filing*, the MGI Counterproposal was impermissibly contingent on a request to reclassify

8/ 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 15 FCC Rcd 21,649 at ¶ 28 (2000) (emphasis added); see also Note 2 to Section 1.420(g) of the Commission’s Rules (“The reclassification of a Class C station in accordance with the procedure set forth in NOTE 4 to § 73.3573 may be initiated through the filing of an *original petition* for amendment of the FM Table of Allotments ”) (emphasis added).

KRFX, even if, assuming *arguendo*, KRFX is eventually reclassified as a Class C0 station, such action would come too late to rehabilitate the MGI Counterproposal. 9/

In sum, the Audio Division correctly implemented Commission precedent and the Commission's express counterproposal policy by dismissing the MGI Counterproposal as technically deficient. MGI does not otherwise assert that the Order was in error. The Media Bureau should deny the MGI Petition.

Respectfully submitted,

**JACOR BROADCASTING OF
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9/ Thus, there is no basis for MGI's separate, concurrent request to consolidate this rulemaking proceeding with the KRFX Application proceeding. Indeed, it is ironic that MGI has moved for consolidation of this rule making proceeding with the KRFX Application proceeding, because it just further proves the point that the MGI Counterproposal was impermissibly contingent on action in another proceeding.

Certificate of Service

I, A. Heidi Fogleman, hereby certify that on this 20th day of April, 2004, a copy of the foregoing **Opposition to Petition for Reconsideration** was sent by first-class mail, postage prepaid, to:

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